



**INDIANA COURT OF APPEALS
ORAL ARGUMENT AT A GLANCE
IU SCHOOL OF LAW—INDIANAPOLIS
WYNNE COURTROOM**

Thomas and Dausman v. Murphy and Boggs

Appeal from:

Marion County Superior Court,
The Honorable S.K. Reid,
Judge

Oral Argument:

Wednesday, September 23, 2009
5:00-6:00 p.m.
30 minutes each side

Criminal Law

Whether the State has violated the plaintiffs' rights, under Indiana law and the U.S. Constitution, by failing to place the plaintiffs in a less restrictive environment to receive competency restoration services?

CASE SYNOPSIS

Facts and Procedural History

For most all of their respective lives, Steven Thomas and Derrick Dausman have lived with their mothers in family settings or near by, due to the serious, underlying developmental disabilities that each man has. In 2006, each was charged with separate incidents of child molesting. Since their arrests on those charges, Thomas and Dausman have each been found to possess insufficient comprehension to stand trial under Indiana statute. Because of their status, each has been placed in an Indiana state mental health institution where each continues to receive "competency restoration services." Indiana's state mental health

institutions are administered by the executive branch of Indiana government.

Because of their serious, underlying developmental disabilities, there is a significant question about whether Thomas or Dausman will ever attain a sufficient level of comprehension to stand trial. They have brought this action for declaratory judgment and injunctive relief, asking that the state mental health institution where they are both held be ordered to place each man in the least restrictive environment appropriate for his continued care and rehabilitation under Indiana statute, including community-based competency restoration programs, claiming that the State's failure to do so

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constitutes a violation of each man's rights under Indiana law and the United States Constitution.

The State has responded that this action is not ripe for review because less-restrictive placement has not yet been recommended by state mental health authorities, that the state institution is the least restrictive placement option that offers competency restoration services, that the issuance of a declaratory judgment or injunction is impermissible under the separation of powers doctrine contained in the Indiana Constitution and that the State's actions regarding Thomas and Dausman comply with both Indiana law and the United States Constitution.

The Marion Superior Court agreed with the State's position and entered summary judgment for the State and against Thomas and Dausman.

Parties' Arguments

I. Ripeness

Thomas and Dausman sought a preliminary injunction to prevent the Division of Mental Health and Addiction ("DMHA"), a division of the Indiana Family and Social Services Administration, an executive agency, from placing criminal defendants lacking sufficient comprehension to stand trial in a state institution "when the medical and psychiatric treatment professionals recommend placement in a less restrictive setting." The trial court noted that Thomas and Dausman were asking for a community placement "if and when their treatment team determines such placement appropriate." The trial court decided that

this is "purely hypothetical and, therefore, not ripe for adjudication."

Thomas and Dausman argue that the case is ripe for review because the DHMA policy was applied to them when they were transported to the state institution and the DMHA has a duty to begin planning for the transition of all patients in its custody, including criminal defendants, into the community.

The State argues that the record supports a finding that Thomas and Dausman's current placement is appropriate and that the treatment team supports that finding. Also, the treatment team determined that the current placement is the most beneficial placement for Thomas and Dausman. Because of this, the State argues, Thomas and Dausman do not have an issue ripe for adjudication.

II. Separation of Powers

The trial court determined that the relief sought by Thomas and Dausman would infringe upon the duties and responsibilities of the legislature and would usurp the statutory discretion given to the DMHA. Additionally, the DMHA has discretion as to the use of its budget within its statutory mandate and the courts should recognize these restraints.

Thomas and Dausman argue that the courts can act to enforce statutes or ensure that a statute is being applied in a manner consistent with the Indiana or U.S. constitution.

The State argues that the courts may not override the discretion of the General

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Assembly in enacting legislation, funding programs, and providing fiscal allotments, nor can it override the agency's discretion in managing its fiscal allotments. There is no requirement that the State enter into contracts for community-based competency restoration services. Courts may not override the discretion of the DMHA and its treatment professionals under IC § 35-36-3-1 et seq. DMHA has statutory discretion to make treatment and placement decisions, inherent under civil commitment statutes.

III. Indiana law and 14th Amendment

The trial court determined that there is no state or federal right to treatment in the community rather than in a state facility, when the treatment that the treatment provided in the state facilities are at least minimally adequate, as it found the treatment to be in this case.

Thomas and Dausman argue that institutionalized patients have a right to appropriate placement in the least restrictive environment which is violated when no community-based options are available because of pending criminal charges. Also, they argue, treatment decisions should be made by qualified medical professionals. They argue that the use of two attorneys in the Office of General Counsel as "gatekeepers" for Thomas and Dausman, rather than medical professionals, to provide case management to the individuals in both the state institution and the community and to facilitate and plan each individual's transition from the state institution to the community or to another appropriate placement rather violates their rights.

The State argues that Indiana Code § 35-36-3-1(b) authorizes the DMHA to place disabled persons in state hospitals that provide for competency restoration services when those hospitals are the least restrictive setting appropriate to the needs of the criminal defendant and the safety of the criminal defendant and others. Under the facts of this case, the State argues that Thomas and Dausman do not have standing to challenge the application of the statute.

The State also argues that there is no constitutional violation because federal constitutional case law does not require that the opinion of an outside psychiatrist does not supersede the decision of the DMHA. The State believes that there is no right to community-based competency restoration services when the treatment team has determined that the state hospital is providing at least minimally adequate treatment at the state hospital.

TODAY'S PANEL OF JUDGES

Hon. Patricia A. Riley (Jasper County) Presiding

- Judge of the Court of Appeals since January 1994

Patricia A. Riley was named to the Indiana Court of Appeals by Governor Evan Bayh in January of 1994. A native of Rensselaer, Indiana, Judge Riley earned her bachelor's degree from Indiana University-Bloomington in 1971 and her law degree from the Indiana University School of Law-Indianapolis in 1974. Early in her career she served as a Deputy Prosecutor in Marion County and a public defender in Marion and Jasper counties before entering into private practice in Jasper County. She served as a judge of the Jasper Superior Court from 1990 to 1993. She is a former associate professor at St. Joseph's College in Rensselaer and currently an adjunct professor at the Indiana University School of Law-Indianapolis.

Judge Riley's legal memberships include the Indianapolis Bar Association, the Marion County Bar

Association, and the Indiana State Bar Association, including co-chair of the ISBA's Racial Diversity in the Profession Section; member, Women in the Law Committee; and member, Committee on Improvements in the Judicial System. Judge Riley is the former chair of the Appellant Practice Section of the American Bar Association, and a member of the ABA's Judicial Division International Courts Committee. She is a member of the Indiana Judges Association and the Board of Directors of the National Association of Women Judges.

Judge Riley is the mother of two sons. She was retained on the Court by election in 1996 and 2006.

"Appeals on Wheels"

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began statewide just prior to the Court's centennial in 2001.

The Court of Appeals has held over 200 "on the road" cases since early 2000.

Sites for traveling oral arguments are often law schools, colleges, high schools, and county courthouses.

TODAY'S PANEL OF JUDGES

Hon. James S. Kirsch (Marion County)

- Judge of the Court of Appeals since March 1994

James S. Kirsch was appointed to the Court of Appeals in March 1994. He served as Chief Judge from March 2004 to February 2007. A native of Indianapolis, Judge Kirsch is a graduate of the Indiana University School of Law at Indianapolis (J.D., cum laude, 1974) and Butler University (B.A. with honors, 1968).

He served as Judge of the Marion Superior Court from 1988 to 1994 and as presiding judge of the court in 1992. From 1974 to 1988, he practiced law with the firm of Kroger, Gardis & Regas in Indianapolis in the areas of commercial and business litigation and served as managing partner of the firm. Since 1990, he has held an appointment as Visiting Professor of Law and Management at the Krannert Graduate School of Management at Purdue University.

Judge Kirsch is a past-president of the Indianapolis Bar Association and of the Indianapolis Bar Foundation and a former member of the Board of Visitors of the Indiana University School of Law-Indianapolis. He is a past-president

of the United Way/Community Service Council Board of Directors and a current or former member of the Board of Directors of the United Way of Central Indiana, the Board of Associates of Rose Hulman Institute of Technology, and of the Boards of Directors of the Goodwill Industries Foundation of Central Indiana, Community Centers of Indianapolis, the Indianapolis Urban League, the Legal Aid Society of Indianapolis, and the Stanley K. Lacy Leadership Association. He is a Fellow of the Indiana State Bar Foundation and of the Indianapolis Bar Foundation. He is a frequent speaker and lecturer and has served on the faculty of more than 200 continuing legal education programs. He has been named a Sagamore of the Wabash by four different governors.

Judge Kirsch and his wife Jan have two children, Adam and Alexandra. Judge Kirsch was retained on the Court in 2006 and stands again for retention in the 2016 fall election.

TODAY'S PANEL OF JUDGES

Hon. Paul D. Mathias (Allen County)

- Judge of the Court of Appeals since March 2000

Paul D. Mathias was appointed to the Indiana Court of Appeals for the Third District in March, 2000. Prior to his appointment, he served as a judge of the Allen Superior Court – Civil Division in Fort Wayne for eleven years and before that as the referee of its Small Claims Division for four years.

Mathias was born in LaGrange, Indiana, and grew up in the Fort Wayne area. He graduated with honors from Harvard University in 1976 and from the Indiana University School of Law in Bloomington in 1979, where he was a member of the moot court team. Until his appointment as small claims court referee he practiced law for six years in a medium-sized Fort Wayne law firm, concentrating in construction law, personal injury, domestic relations, and appellate practice.

Like all judges on the Court of Appeals, Mathias writes over 150 opinions each year and votes on more than 300 opinions written by his fellow judges. Off the bench, he also maintains a keen interest in civic education. Judge Mathias is especially proud of his deep and long-standing commitments to the *We*

The People program, which is the civics education program sponsored by the Indiana Bar Foundation, Indiana State Bar Association, and the Indiana Judges Association, and to the Indiana Judges Association itself, which he has served as President and for which he continues to serve as a legislative liaison to the General Assembly. He is also an active member of national, state and local bar associations.

Mathias has been honored to receive the Centennial Service Award from the Indiana State Bar Association, “[i]n recognition of the Indiana bar and judiciary, living and deceased, who have provided outstanding leadership and service to the public and the profession,” and a Sagamore of the Wabash award from Governors O’Bannon and Kernan.

Mathias and his wife, Carlabeth, have been married thirty-three years and are the proud parents of two sons, Ethan and Corbin. Carlabeth is a child and family counselor in Hamilton County. They enjoy travel, music, theater, and doing just about anything together as a family.

ATTORNEYS FOR THE PARTIES

For Appellant, Thomas and Dausman:

Gavin M. Rose
1031 E. Washington Street
Indianapolis



Gavin M. Rose is a 2006 graduate of Indiana University Maurer School of Law – Bloomington. He previously received his B.A. from the University of California, Davis. While in law school, Mr. Rose served as the president of the Public Interest Law Foundation and as a Managing Editor for the Indiana Law Journal.

Mr. Rose has been a Staff Attorney with the ACLU of Indiana since 2006, in which capacity he

litigates cases concerning civil rights and civil liberties in state and federal courts throughout Indiana.

From 2006 through 2007 he served as the Director of the Disability Rights Project at the ACLU of Indiana, and he continues to focus a large portion of his practice on issues related to disability rights. In addition, Mr. Rose has served as the Legislative Director of the ACLU of Indiana since 2007.

For Appellee, Murphy and Boggs:

David A. Arthur
Attorney General's Office
Indianapolis

Deputy Attorney General David A. Arthur obtained his B.A. with Distinction in 1972 from Indiana University in Bloomington, Indiana, and his J.D. *cum laude* from the Indiana University School of Law-Bloomington, in 1975. He has been a Deputy Attorney General continuously since July 26, 1976, working in substantially the same areas of the law during that entire time except for a brief stint in the Tax Section in 1992 and 1993. Although the Section to which he is assigned has undergone several name changes under the seven Attorneys General David has served (Criminal Justice Liaison, Federal Litigation, Government Litigation and, currently, Civil Rights and Employment), the types of cases have remained substantially the same: Litigating civil rights and constitutional issues at the trial court level, with some appellate work of cases he was assigned at the trial level.

In David's earlier years in the Attorney General's office, before the addition of a civil appeals section, the trial attorney also handled any appeal in the case. As a consequence, David has orally argued a dozen or so cases each in the Indiana Supreme Court, Indiana Court of Appeals and Indiana Tax Court, as well as dozens and dozens of cases in the United States Court of Appeals for the Seventh Circuit, perhaps 100 or more. He has also argued cases on behalf of Indiana officials in the United States Courts of Appeal for the Second and Eighth Circuits and is also admitted to practice and has briefed appeals in the U.S. Supreme Court, Sixth and Ninth Circuits and has appeared in courts in at least 15 other federal districts and the state courts in two other states.